before another Collector, the chargor and other witnesses gave evidence and, on the 7th of October, judgment was reserved. The chargee was not recalled on either of these days, but it appears from the record that a copy of the notes of his evidence was produced.

Mr. Hastings, who appeared for the appellant, pointed out that the evidence of the chargee was of the utmost importance, as the principal question for adjudication was a question of fact, viz.: whether the consideration for the charge was $3,000 or only $960 as alleged by the chargor. Mr. Hastings also pointed out that although under section 261 of the Criminal Procedure Code a Magistrate may act on evidence recorded by his predecessor, and under section 208 of the Civil Procedure Code a Judge, other than a Judge of the Supreme Court, might similarly act, yet there was no provision in the Land Code enabling a Collector to adopt such procedure.

In the absence of any statutory provision, it is at least irregular, if not unlawful, for a Judge to continue the hearing of a case which has been part-heard by another Judge, and particularly so where there is, as in this case, a conflict of evidence. In the case of *Coleshill v. Manchester Corporation*[2], Scrutton, L.J., stated in the course of his judgment (pages 785 and 786):—

> "This case was heard under melancholy circumstances. Mr. Justice Fraser, who began the case on Thursday, July 7th, and had heard three of the plaintiff's witnesses, was taken ill during the night and died on the Friday. Mr. Justice Acton was sent down from London on the Sunday and, having read Thursday's short hand notes, at the urgent request of the parties, continued the case with the same jury on Monday the 11th, the Thursday's witnesses not being recalled. I can understand that in the unprecedented and painful circumstances it is unnecessary to take any objection to what happened, but I think it is a precedent which should not be followed in future. I doubt whether a Judge has any jurisdiction to continue the hearing of a case in which witnesses have been called in Court in the course of the trial before the jury and another Judge, it not being a case of evidence being taken on commission or before an examiner".

These observations were considered in a later case before the Railway and Canal Commission, viz.: *In re Application of British Reinforced Concrete Engineering Co., Ltd.*[1]. In that case, the head-note is as follows:—

> "Where during proceedings without a jury, after some of the witnesses have been called, the presiding Judge dies, another Judge, if there is no conflict of evidence, may at the request of the parties preside at the continuation of the hearing, after reading the short-hand notes of the evidence, and need not have the witnesses recalled";

and MacKinnon, J., stated that the dictum of Scrutton, L.J., above referred to was directed to a case heard before a jury where there was a conflict of evidence. He could see no objection in this case to the procedure proposed by the parties.

Mr. Toswill argued that the Land Code intended to lay down a simple and informal procedure, that no objection was taken to another Collector continuing the hearing of this application, and that if it was not unreasonable in the Magistrate's Courts for a similar procedure to be adopted, it was *a fortiori* not unreasonable for a Collector of Land Revenue to adopt such procedure.

The Criminal Procedure Code, however, does recognise that the recording of evidence by two Magistrates may lead to the prejudice of an accused person. Section 261 (b) is as follows:—

> "The Court of a Judge may, whether there be an appeal or not, set aside any conviction had or commitment made on evidence not wholly recorded by the Magistrate before whom the conviction was had or the commitment made, if such Court is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial".

In this case if the evidence of the chargee had been unquestioned and admittedly accurate, there would have been considerable substance in Mr. Toswill's contention, but as his evidence was alleged to be, to put it mildly, inaccurate (he was cross-examined for two days), and the whole case depends on the accuracy or otherwise of such evidence, only one Collector of Land Revenue should, in my opinion, have adjudicated on this application.

For the above reasons I allowed the appeal with costs, such costs to be set off against such amount as may be found to be due to the chargee, and directed that the application be referred back for hearing "*de novo*" before another Collector of Land Revenue.

Appeal allowed with costs. Application referred back for hearing "de novo" before another Collector.

[ORIGINAL CIVIL JURISDICTION]

HORNE, J.

March 1, 1940.

RAMASAMY v. MUNIAPPAN.

[RAUB CIVIL SUIT]

Contract Enactment (Cap. 52), Secs. 23 and 24—Societies Enactment (Cap. 96), Sec. 10—Illegal purpose—Kutu (Chit Fund)—Money lent to meet liability thereunder.

In a suit on a promissory note for $400.00, the defendant alleged that the consideration consisted of, **inter alia**, (a) a sum of $130.00 drawn by the plaintiff

from a **Kutu** and lent by him to the defendant (b) a sum of $130.00 lent by the plaintiff to the defendant, who managed the **Kutu**, to enable him to discharge his liabilities thereunder. The **Kutu** consisted of 26 persons and was not registered under the Societies Enactment (Cap. 96).

Held (1) that a collection of 26 people who agree together each to deposit $5.00 bi-monthly and who agree to decide by lot that each of them shall have the total amount subscribed in turn was rendered illegal by Sec. 10 of the Societies Enactment as being an unregistered Society of more than 10 persons.

(2) Nevertheless the object of such a society and the contracts between its members may well give rise to civil rights and obligations. Money lent to meet such an obligation is lawful consideration for a promissory note given in respect of such loan.

Case referred to:—

(1) *Greenberg v. Co-operation* (1926) Ch. 657.

TRIAL OF ACTION.

Plaintiff in person.

K. K. Benjamin for defendant.

$260, being part of the consideration for the note, was made up of monies due on a Kutu which was run among 26 members. Under section 10 of the Societies Enactment, the Kutu not being a registered society, it was an unlawful society and being an unlawful society consequently by sections 23 and 24 of the Contract Enactment the contract on the note is void.

Balance of $140 on the note is amounts paid on behalf of the defendant and that was entirely a question of fact and the plaintiff produced no acknowledgment from the persons he paid and so there was no proof of payment.

Horne, J.—The plaintiff claimed $644 on a promissory note. He also claimed to be entitled to a charge on certain land but that claim he abandoned at the trial.

The defendant obtained leave to defend and filed a written statement of defence alleging that for five years, being illiterate, he had entrusted the management of his affairs to the plaintiff, and that he had come under the control of the plaintiff; and, having incurred certain debts, he had executed promissory notes to all his creditors under the plaintiff's instructions. In the course of these transactions the defendant alleges that his thumbmark was obtained by the plaintiff to the promissory note sued upon by a false statement made to him by the plaintiff and some other person. In his evidence at the trial the defendant states that he does not remember making a note for $400 at the plaintiff's request for he did not owe the plaintiff any money. He also denied ever paying anything on account.

Although the defendant is illiterate he is in my opinion a person of average intelligence and quite capable of looking after his own affairs. The plaintiff is a much younger man. On the whole of the evidence I cannot say that he has proved his allegation that he was under the control of the plaintiff. If his case is that he has been defrauded or tricked into signing (marking) a note when there was no existing debt, then again he has failed to prove such case.

He admits that the thumbmark on the back of the note is his own. The endorsement is in my view a sufficient acknowledgment under section 18 of the Limitation Enactment. In order to rebut his evidence to the effect that there is no debt, there is the plaintiff's account of the transactions, and the evidence of Vellupillay of the defendant's oral admissions of indebtedness.

Another line of defence to the claim was set up during the trial by Mr. Benjamin to the effect that some of the debts for which the note was given arose out of a "Kutu"; that a "Kutu" is an unlawful society; and consequently by sections 23 and 24 of Chapter 52 the contract on the note is void.

As I understand the plaintiff's evidence he obtained the first draw in the "Kutu" and received $130. He then lent this sum to the defendant. I think it right to find as a fact that the Kutu was the defendant's affair. He was keeping a shop and organized it among his customers, and no doubt got into difficulties over it.

Samiappan's evidence is that it was the defendant's "Kutu" though he admits paying his contribution to the plaintiff. When Samiappan had his turn to draw $130 the defendant was unable to pay and requested the plaintiff to pay and plaintiff after giving Samiappan a document in Tamil paid the $130 in two instalments.

I find that the plaintiff lent the $130 (he obtained from the Kutu) to the defendant.

I also find that the plaintiff at the request of the defendant paid $130 to Samiappan.

This $130 is therefore money lent by the plaintiff to the defendant. It is however, submitted that the contract to repay is void and consequently there is no consideration for the note on the ground that to the plaintiff's knowledge the money was used in the transaction of a "Kutu". A Kutu according to Mr. Benjamin's argument is an unlawful society under Chapter 96, because the membership or persons associating together in this case exceeded ten and it is not recorded nor registered. Section 10 of Chapter

96 does in my opinion make a collection of 26 people who agree together each to deposit $5 bi-monthly and who agree to decide by lot that each of them shall have the total amount subscribed in turn an unlawful society under that Enactment.

Accordingly its managers and members are liable to prosecution under the the criminal law for not being registered or recorded. Nevertheless the objects of a society and the contracts between its members may well give rise to civil rights and obligations enforceable between the members and/or the officers even though the society is forbidden by law or its managers or members liable to criminal prosecution for being in existence without the publicity demanded by law. I can find no unlawful object or purpose in this Kutu, as disclosed by the evidence. At any time the manager can be called upon to account to the member whose turn it is to take the $125 or if called upon to account to the twenty-five as to what he had done with their $125 could discharge himself by showing he had paid the member whose turn it was to take the loan—*Greenberg v. Cooperstein*[1]. And I fail to understand why one who lends the manager money in order to meet such a liability has no right to be repaid.

I therefore hold that the consideration for the promissory note was a lawful consideration.

The onus was on the defendant to establish his allegations. He has failed and judgment must be given for the plaintiff for the principal sum, for interest at 12 per cent. to date of hearing, and costs on scale proper to this suit in first class Magistrate's Court.

Judgment for plaintiff.

[APPELLATE CRIMINAL JURISDICTION]

POYSER, C.J. (F.M.S.), TERRELL, Ag. C.J. (S.S.) & GORDON-SMITH, Ag. J.A.

August 23, 1940.

CHIN WAH v. PUBLIC PROSECUTOR.

[PERAK CRIMINAL REFERENCE No. 2 of 1940]

Penal Code (Cap. 45) Sec. 406—Breach of trust —what constitutes.

The complainant lent the gold necklace, the subject matter of the charge, to the appellant in order that the latter's wife might wear it at a party. The necklace was not returned to the complainant, although she frequently asked for its return, and eventually appellant admitted that he had pawned it.

Held, that as the essence of the offence of the criminal breach of trust is the "dishonest" misappropriation or conversion by a person of property entrusted to him the appellant was rightly convicted. **Gan Beng v. Public Prosecutor**[1] approved. **Ng Chye Giat v. Rex,**[2] dissented from.

Cases referred to:—

(1) *Gan Beng v. Public Prosecutor,* 8 M.L.J. 314.

(2) *Ng Chye Giat v. Rex,* 7 M.L.J. 126.

(3) *Ragubir Kurmi,* 1 U.P.L.R. p. 69.

CRIMINAL REFERENCE.

Appellant in person.

T.V.A. Brodie for the Public Prosecutor.

Cur. Ad. Vult.

(Poyser C.J., (F.M.S.), Terrell Ag. C.J., (S.S.) Gordon-Smith Ag. J.A.)—Acting under the provisions of section 53 of the Courts Enactment (Cap. 2), Howes J. referred this appeal to the Court of Appeal. His reasons for so doing were that in his opinion the appeal raised an important point of law in regard to which there were conflicting decisions, *viz*: whether a person can be convicted of criminal breach of trust, when a chattel the subject matter of the charge, has been obtained by the accused person as a gratuitous loan. At the conclusion of the hearing we dismissed the appeal, but stated that we would give our reasons for so doing in a written judgment.

The material facts, as found by the Magistrate, are as follows. The complainant lent the gold necklace, the subject of the charge, to the accused, in order that the latter's wife might wear it at a party. The necklace was not returned to the complainant, although she frequently asked for its return, and eventually the accused admitted that he had pawned it.

Howes J. was of the opinion that the transaction between the parties was of a purely civil nature, and that the criminal law should never have been invoked. In this connection he referred to one of his own decisions viz: *Ng Chye Giat v. Rex,*[2] in which he held that:—

> "A loan of jewellery to another does not create any legal trust within the meaning of section 405 of the Penal Code; even if a promise to return the same within a stated time is given. The mere pawning of the jewellery by the person to whom it is lent will not, therefore, amount to criminal breach of trust as defined in that section".

Murray Aynsley J. in the case of *Gan Beng v. P. P.*[1] dissented from this decision, and held that the wording of section 405 was wide enough to include bailment, and that when a person borrowed a bicycle and misappropriated it, he was rightly convicted under this section.

The above are the conflicting decisions Howes J. referred to. We agree with the principles enunciated by Murray Aynsley J. and considered that the accused